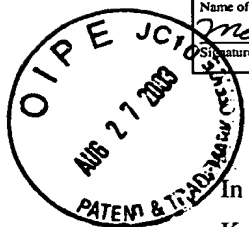


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Matthew P. Fitzpatrick 41,751  
Name of Attorney Registration No.

Signature of Attorney *Matthew P. Fitzpatrick*



P&G Case 8241

AF/61  
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#19/appeal  
Brief

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :

Karen A. Kreutz et al.

: Confirmation No. 5529

Serial No. 09/653,012

: Group Art Unit 3761

Filed September 1, 2000

: Examiner M. Kidwell

For Feminine Hygiene Kit

BRIEF ON APPEALS

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P. O. Box 1450

Alexandria, VA 22313-1450

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application. The Brief is being forwarded in triplicate.

Please charge the fee of \$320.00 pursuant to 37 C.F.R. 1.17(c) to Deposit Account No. 16-2480 for the filing of the brief in support of an appeal. The Commissioner is also authorized to charge any additional fees which may be required to this account. A duplicate copy of this sheet is enclosed.

03/28/2003 GWRD00F1 00000037 162480 03653012

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Respectfully submitted,

By *Matthew P. Fitzpatrick*  
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Attorney for Applicant(s)  
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Date: August 22, 2003

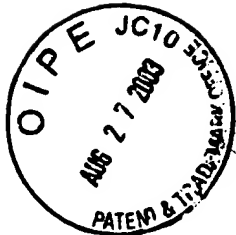
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Matthew P. Fitzpatrick 41,751  
Name of Attorney Registration No.  
*Matthew P. Fitzpatrick*  
Signature of Attorney



P&G Case 8241

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :

KAREN A. KREUTZ, et al. :

Confirmation No. 5529

Serial No. 09/653,012 :

Group Art Unit 3761

Filed September 1, 2000 :

Examiner M. Kidwell

For FEMININE HYGIENE KIT

APPELLANT'S BRIEF

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P. O. Box 1450

Alexandria, VA 22313-1450

Dear Sir,

This is an appeal from the final rejection of pending claims 1-6 and 8-20 which was made in an Office Action (Paper No. 17) dated March 26, 2003. A timely notice of appeal was filed on June 26, 2003 and received by the USPTO on June 30, 2003. Appellant's brief is submitted in triplicate.

REAL PARTY IN INTEREST

The appellant named in the caption of this appeal brief has assigned the entire interest in this application has been assigned to The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, or known to Appellant's legal representative, that will directly affect the Board's decision in the present appeal.

STATUS OF CLAIMS

Claims 1-6 and 8-20 are pending and stand rejected. The rejection of Claims 1-6 and 8-20 is being appealed. A copy of Claims 1-6 and 8-20 on appeal appears in the attached Appendix.

### STATUS OF AMENDMENTS

The Appellants have not filed any amendments subsequent to the Final Action.

### SUMMARY OF INVENTION

Appellants' claimed invention (see claim 1 which is representative) relates to a feminine hygiene kit. The kit (Fig. 1, item 20) in its simplest form may be thought of an outer package (Fig. 1, item 22) housing the individual components of the kit. (Page 5, lines 23-26).

The kit contains at least an absorbent tampon and a backup feminine hygiene product, such as a pantliner (Fig. 1, item 24, item 26; page 5, line 27-page 3, line 5). The absorbent tampon itself (Fig. 4, item 24) has an absorbent core (Fig. 4, item 60) and a withdrawal mechanism (Fig. 4, item 67). (Page 8, lines 9-18). The absorbent core of the tampon has a synergistic absorbent capacity of less than 6 grams. (Page 9, line 15).

The backup feminine hygiene product may take on several forms such as a pantliner (Fig. 2, item 26; page 6, line 29-page 7, line 35); a sanitary napkin (page 12, lines 5-12), or an interlabial device (page 12, lines 5-14).

Additional optional items, designed to aid in tampon insertion training and practice may be added to the kit. Such items include a mirror (Fig. 5A; page 12, lines 15-25); lubricant (Fig. 5B; page 12, lines 26-32); an insertion glove (Fig. 5C; page 12, lines 32-35); a finger cover (Fig. 5D; page 12, lines 32-35) or a tampon insertion guide (Figs. 6-8; page 14, lines 16-29).

Further optional items, designed to provide a "reward" for positive feedback may also be added to the kit. (Page 13, lines 9-13) Such items include candy (Fig. 5E), a bath product (Fig. 5F), or a coupon (Page 13, lines 26).

The kit may also contain an instruction booklet (Fig. 5G), which may provide tips to use users and assist a user in creating a system of tampon usage. (Page 13, line 27- page 14, line 15).

### ISSUES

1. Whether Claims 1-5 are nonobvious under 35 U.S.C. § 103 over Moder et al. (U.S. Patent 5,986,165).

2. Whether Claims 1, 6 and 8-20 are nonobvious under 35 U.S.C. § 103 over Stravitz (U.S. Patent 6,164,442).
3. Whether Claims 10-13 are nonobvious under 35 U.S.C. § 103 over Stravitz in view of Morrow (U.S. Patent 5,988,386).

#### GROUPING OF CLAIMS

The ground of rejection of Claims 1-5 under 35 U.S.C. § 103 over Moder is equally applicable to Claims 1-4. Claim 5 is separately patentable. The reasons Claim 5 is separately patentable from Claims 1-4 are discussed in the ARGUMENT section, following.

The ground of rejection of Claims 1, 6 and 8-20 under 35 U.S.C. § 103 over Stravitz (U.S. Patent 6,164,442) is equally applicable to Claims 1, 6, 9, and 19-20. Claims 14-18 define a second, separately patentable group for which the ground of rejection is equally applicable to each claim in the group. Claims 10-13 define a third, separately patentable group for which the ground of rejection is equally applicable to each claim in the group. Claim 8 is separately patentable from each of the previous three groups with respect to this ground of rejection. The reasons why each of the above-identified two groups and claim 8 are all separately patentable from each other are discussed in the ARGUMENT section, following.

The ground of rejection of Claims 10-13 under 35 U.S.C. § 103 over Stravitz in view of Morrow is equally applicable to Claims 10-13.

### ARGUMENTS

- I. The final office action does not make out a proper § 103 rejection of Claim 1 over Moder because there is no showing of sufficient motivation to modify the reference, and even if a proper *prima facie* case has been made, the final action fails to consider properly the evidence cited by appellants in rebuttal.**

In the Final Office Action, the Examiner rejected Claims 1-5 under 35 U.S.C. § 103 as obvious over Moder et al. (U.S. Patent 5,986,165). Contrary to the Examiner's position, however, these rejections are improper and should be reversed.

- A. There is no teaching in the Moder et al. patent suggesting the desirability of substituting the higher absorbency tampons disclosed with a tampon having a syngyna capacity of less than 6 grams.**

The feminine hygiene kit of Appellants' Claim 1 requires an absorbent tampon having an absorbent core with a syngyna absorbent capacity of less than 6 grams. Additionally, the kit also requires a backup feminine hygiene product packaged in a common package with the tampon. The syngyna absorbent capacity is a well known industry standard test, and is required by the United States Food and Drug Administration to be performed on samples of all tampons sold in the United States. The FDA also requires tampons be labeled on the basis of the results of this syngyna test.

The Appellants' are in agreement with the Examiner's position articulated in the Final Office with respect to the scope and contents of the prior art and the differences between the claimed invention and the prior art. Namely, Applicants' concede that the Moder et al. patent does indeed disclose a feminine hygiene kit comprising an absorbent tampon with an absorbent core and a withdrawal mechanism attached thereto. Moder et al. also discloses a backup feminine protection product in the form of a pantiliner where the tampon and pantiliner are packaged in a common package. Appellants' also agree with the Examiner that the difference between this cited prior art and the claimed invention is that the Moder et al. patent does not disclose that the absorbent core of the tampon has a syngyna absorbent capacity of less than 6 grams.

In order to establish a *prima facie* of obviousness, the Office Action must show a motivation to modify the reference in the manner claimed and a reasonable expectation of success resulting from this modification. This suggestion of the desirability of the modification must come from the teachings of the prior art itself and not from the Appellants' own disclosure. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

In the instant case, the reasoning supposedly supporting the *prima facie* case of obviousness is found on pages 2-3 of the Final Office Action:

It would have been obvious to one of ordinary skill in the art to modify the kit of Moder by providing an absorbent tampon having an absorbent core with a synergistic absorbent capacity of less than 6 grams because Moder discloses the use of the three of the four absorbencies designated by the FDA in his [sic] patent and states that depending upon the desired absorbency one desires in the finished tampon, the basis weight of the absorbent ribbon can vary as set forth in col. 20, lines 1-13. Therefore, it would only require ordinary skill in the art to provide a lighter absorbency, i.e. the use of a junior tampon – the fourth absorbency designated by the FDA, if desired.

Appellants' take issue with some of the implied factual findings contained in this analysis and these will be addressed further below. Nevertheless, this analysis merely concludes that one of ordinary skill in the art **could** have made the required modifications to the prior art to arrive at the claimed invention (i.e. it would require "only ordinary skill"). However, the burden on the Examiner is to show not merely that one of ordinary skill in the art **could** have made the required modification, but that she would have recognized the **desirability** of doing so. In Re Mills, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). Appellants do not necessarily dispute that such a modification could be made relatively easily "if desired", but note that it is the very desirability of the modification in the first instance that the Office Action is required to show. Ex Parte Levengood, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993).

The Final Office Action makes one more attempt to address this deficiency in making the *prima facie* case. On page 3 of the Final Office Action, the Examiner states:

Likewise, since Moder discloses a "regular" absorbency, a "super" absorbency and a "super-plus" absorbency, it shows that Moder recognizes the advantages of making different absorbencies in the kit for use based on the desire of the consumer. Therefore, it would have been obvious to include a "junior" absorbency, if desired, in the same type of kit disclosed by Moder.

Once again, this reasoning assumes what it must show in the first instance. At best, this analysis demonstrates that Moder recognized that different absorbency tampons **could** be provided, and specifically considered absorbency ranges from greater than 6 grams up to 15 grams. The Final Action, however, assumes the existence of the desire of the consumer for a kit with a junior absorbency tampon and assumes that Moder would therefore have been motivated to provide such a kit. Neither proposition is supported by the record. The analysis given in the Final Office Action boils down to the fact that the prior art taught that tampons of certain different absorbencies can be provided in combination with a backup feminine hygiene product such as a

pantiliner. Therefore, it would have been obvious to include tampons of other, undisclosed absorbencies as well – presumably for the sake of “completeness” although the Final Action gives no particular motivation for such a substitution.

**B. Even if a proper *prima facie* case of obviousness with respect to Claim 1 has been made, the Final Office Action fails to consider properly the evidence cited by Appellants in rebuttal in making the ultimate finding of obviousness.**

For the reasons given above, the Final Office Action has failed to make out a proper *prima facie* case of obviousness with respect to Claim 1. By giving the reasoning contained in the Final Office Action its most generous reading one could conclude that Moder et al. teaches providing a tampon in combination with a backup feminine hygiene product and that the absorbency of the tampon can be varied among certain known absorbencies. Even assuming that such teaching is sufficient to support a *prima facie* showing of obviousness to modify the absorbency of the Moder et al. tampon to include other known but undisclosed absorbencies, the Final Office Action must still consider the evidence properly cited by the Appellants during prosecution in rebuttal of such a showing. When such evidence on the record rebutting any such *prima facie* case is properly considered -- especially given the absence in the Final Office Action of any proper contrary evidence -- it is clear that any *prima facie* case that may be deemed to have been made has been overcome.

At the outset, Applicants point out that the Examiner is required to consider all proffered evidence of nonobviousness in making the final determination under 35 U.S.C. § 103. In Re Sang Su Lee, 277 F.3d 1338, 61 U.S.P.Q.2d 1430 (Fed. Cir 2002). This evidence can come from (among other places) the specification and arguments or remarks made during prosecution. In Re Chu, 66 F.3d 1995; 36 U.S.P.Q.2d 1089 (Fed. Cir. 1995). MPEP 716.02(f). After evidence or argument is submitted in response to an obviousness rejection, patentability is determined on the totality of the record by a preponderance of the evidence with due consideration to persuasiveness of the argument. Id.

Before turning to the Final Office Action’s treatment of Appellants’ evidence cited in rebuttal of the obviousness rejection of Claim 1, the evidence itself will be briefly summarized. This evidence, it will be noted, was originally presented in the specification itself beginning on page 9, line 33 and continuing through page 11, line 28. The essence of this portion of the specification (and of arguments previously made in prosecution) is that low absorbency tampons are particularly suited for kits of the present invention which are intended to be “learner’s kits” for

new or novice users of tampons. The Appellants discovered while making their invention that novice users often fear accidental soiling or leakage when first trying tampons. Because of the fear of accidental leakage or soiling, new tampon users tend to use a higher absorbency tampon than they might need. Further complicating matters, when a higher absorbency tampon is used for a short period of time, or when actual menstrual flow is low, removal of such a "dry" tampon tends to result in discomfort. Such discomfort often contributes to new users rejecting tampons in their entirety as "not for them" rather than continuing to experiment with different product offerings. All of these insights were discovered by the Appellants and were discussed in the instant specification in at the specification location cited above.

The kit of the present invention helps overcome the discomfort experienced by many new tampon users by offering low absorbency tampons which will tend to have less dry fiber upon removal, even when worn for a short period of time. Additionally, by providing a backup feminine hygiene product as re-assurance, the users of the kit of the present invention are more likely to follow the instructions to use the tampon for a sufficient time and when the user's menstrual flow rate is moderate for her.

The Final Office Action does not directly respond to any of this cited evidence in violation of the requirements of making the ultimate determination of obviousness noted above. Rather, the Final Office Action ignores these showings and relies instead on unsupported and incorrect factual findings and improper use of the Appellants' own specification against them.

The first response offered in the Final Office Action to Appellants' showing of nonobviousness is essentially a re-statement of the reasoning relied upon for the *prima facie* case. On page 7 of the Final Office Action, the Examiner notes:

This passage [from Moder et al.] discloses that the basis weight of the absorbent ribbon can vary depending upon the desired absorbency of the finished tampon. Therefore, it would have been obvious to one of ordinary skill in the art to modify the basis weight of the disclosed tampons (i.e. the sizes disclosed as "regular", "super" and "super plus") since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

As noted above in Section A, the fact that "only routine skill" may be involved is beside the point in an obviousness showing. The remainder of this analysis is unsupported by the evidence. The Final Office Action puts forth no showing that the invention of Claim 1 is about providing an "optimum" or "workable" range for a problem recognized in the art. In fact, the evidence cited above in the specification demonstrates that it was counter-intuitive at the time the present



invention was made for consumers (particularly new tampon users) to try low absorbency tampons on their own.

The second response in the Final Office Action is without evidentiary support and is factual erroneous. The Final Office Action on page 7 (third paragraph) , and page 8 (last sentence, continuing on page 9), states that the 6 categories of tampon absorbency currently recognized by the FDA were only so recognized as of April 1, 2002. Additionally, the Office Action states that the “traditional” absorbency terms are “regular, super and super-plus” and the remaining absorbencies were added at a later date. Both of these statements are untrue. These statements are not supported by any evidence of record, and to the extent that the Office Action is taking Official Notice of such “facts” the Appellants hereby challenge such notice. Accordingly, the Examiner is required to provide documentary evidence of these “facts” if the rejection is to be sustained. See, 37 CFR § 1.104(c)(2); In re Zurko, 258 F.3d at 1386, 59 USPQ2d at 1697 (Fed. Cir. 2002).

The Appellants’ legal representative previously provided the Examiner with a copy of 21 CFR § 801.430 as evidence that the syngyna test was well-known in the industry and is in fact required by the United States. The actual page reproduced from the Regulations was from the April 1, 2002 revision of Title 21 –the most recent update of the Regulations at the time the citation was submitted. This does not mean that the section cited read any differently at the time the invention was made, nor has the Examiner cited any proof for her assertion that it did. The April 1, 2002 revision date simply means that the entirety of Title 21 was re-published with updates noted in the Federal Register since the last publication on April 1, 2002. Appellants note that they provided the Examiner with the current text of 21 CFR § 801.430 for her convenience. A cite to a provision of the Code of Federal Regulations is sufficient to not only determine what requirements such regulations contain, but when such regulations came into effect (by virtue of the List of Sections Affected index in the Federal Register).

Appellants state for the record that the current FDA accepted tampon absorbencies were established no later than April 26, 1990. In support of this, Appellants have included with this brief a copy of the April 1, 1999 revision of 21 CFR § 801.430 which shows the same 6 absorbency categories as those currently recognized (although the term “ultra absorbency” was not in use in 1999 –the absorbency range of greater than 15 to 18 grams was). Additionally, this copy also gives the Federal Register citations to revisions of the section which clearly indicate that this section had not been amended (in 1999) more recently than April 26, 1990. Therefore, to the extent the Final Office Action relies on reasoning that the Appellant’s have merely added later

developed absorbency ranges to those known in the prior art – such reasoning is factually incorrect and cannot be the basis for a finding of obviousness.

The fact of the matter is, junior absorbency tampons (i.e. 6 grams or less) were known at the time the Moder et al. patent application was filed (as were tampon absorbencies in the range of greater than 15 to 18 grams and greater than 18 grams). Nevertheless, Moder et al. only discloses the inclusion of tampons having absorbencies ranging from greater than 6 grams to 15 grams. To the extent that one of skill in the art would be motivated to modify Moder et al. to include other undisclosed absorbencies, such a person would be just as likely to go up (e.g. to greater than 15 grams) as to go down. The Final Office Action puts forth no evidence addressing Appellants' showing that low absorbency tampons offer unexpected advantages, particularly in kits designed for a new or novice user.

The third attack in the Final Office Action on Appellants' evidence in support of patentability comes from using the Appellants' own specification against them. Appellants' Claim 1 originally claimed that the absorbency of the tampon included in the kit was less than or equal to about 6 grams. In the first Office Action, the Examiner rejected this claim under the reasoning that 6.01 grams for example was about equal to 6 grams and could be construed as coming within the express teaching of Moder et al. In order to avoid this issue, Appellants amended their claims to their current form where the claimed absorbent capacity is "less than 6 grams." Nonetheless, the Final Office Action, uses the fact that the Appellants' specification discloses an absorbency range of less than or equal to about 6 grams as "suitable" as an admission that a regular absorbency tampon (such as those disclosed in Moder et al.) would "work equally as well as junior absorbency tampon." It is of course, completely improper for the Applicants' own specification to be the source of evidence provided in making an ultimate case of obviousness. The fact that the specification discloses a range of absorbencies coming close to the prior art does not change the fact that the currently pending claim is not in fact shown in the prior art and there is no evidence of record suggesting the desirability of modifying the prior art in the manner claimed which does not come from Applicant's own disclosure.

The fourth and final attack on Appellants' evidence supporting patentability of Claim 1 actually supports Appellants' case rather than defeat it. The Final Office Action notes (on page 8) in response to the cited advantages of providing a low absorbency tampon in the claimed kit: "Just because a consumer may be younger or a novice using the claimed invention does not mean that the consumer will have a light flow." This is exactly the point the Appellants have been trying to make in their specification and in response to the Examiner's rejections of Claim 1. What

Appellants have recognized is that novice users tend to try tampons at **times** of low flow (such as early or late in their menstrual period) even if their **typical** flow is not necessarily light. It is believed that such behavior comes from the concerns of leakage and soiling as described in the specification and mentioned above. What was unexpectedly recognized by the Appellants is that **most** novice users (even those with typical flow rates which are not necessarily light) will tend to have a more positive tampon trial experience if they try low absorbency tampons first rather than higher absorbency tampons. Because many of such users tend to self-select higher absorbency tampons, they are "setting themselves up" for a potentially negative first usage experience. The kit of the present invention encourages **all** novice users to try low absorbency tampons by providing the re-assurance of a backup form of protection during the learning process. It has been found by Appellants that providing the low absorbency tampon in this context increases its trial among users, and increases the acceptance of tampons after such trial. Such a recognition is nowhere contained in any of the references cited in the Final Office Action.

In light of the showings made above, even if a *prima facie* case of obviousness with respect to Claim 1 has been made, the Appellants have sufficiently rebutted it, and the Final Office Action does not properly weigh this evidence in making a proper ultimate determination. Accordingly, the rejection under 35 U.S.C. § 103 of Claims 1-5 over Moder et al. should be reversed.

**C. Claim 5 is directed to a feminine hygiene kit in where the backup feminine protection product is an interlabial device and such a teaching is wholly missing in the Moder et al. reference..**

The Final Office Action cites col. 3, lines 5-9 of the Moder et al. patent as supposedly disclosing a feminine hygiene kit comprising a tampon and an interlabial device. Such a disclosure, however, is not found in the Moder et al. patent. The feminine protection art discloses three basic product forms: external pads such as pantliners, shields, or sanitary napkins; internal absorbents such as tampons; and hybrid devices that reside within the interlabial space, but not within the vagina itself. These hybrid forms are commonly referred to as "interlabial devices." Even assuming that the rejections of Claims 1-4 over Moder et al. are proper, the Final Office Action does not show how Moder et al. teaches or suggests a kit having the claimed combination of a low absorbency tampon and a backup product in the form of an interlabial device. Because such a device is a completely different product form than the pantliner disclosed in Moder et al. it would not have been suggested merely from the Moder et al. disclosure as indicated in the Final Office Action.

**II. The final office action does not make out a proper § 103 rejection of Claim 1, 6, and 8-20 over Stravitz because these rejections rely on the same analysis and reasoning used with respect to the rejections over Moder et al.**

In the Final Office Action, the Examiner rejected Claims 1, 6, and 8-20 under 35 U.S.C. § 103 as obvious over Stravitz (U.S. Patent 6,164,442). Contrary to the Examiner's position, however, these rejections are improper and should be reversed.

**A. The application of Stravitz to Claim 1 in the Final Office Action relies upon all of the same reasoning used to reject Claim 1 under Moder et al. – in fact the rejections over Stravitz rely upon the Moder et al. reference itself.**

The Stravitz patent (as correctly noted by the Examiner) discloses a feminine hygiene kit comprising an absorbent tampon and a backup feminine hygiene product where the tampon and backup product are packaged in a common package. The Stravitz patent, however, does not disclose that the tampon have a withdrawal mechanism or that the absorbent core of the tampon have a synergistic absorbent capacity of less than 6 grams.

In order to overcome the second missing teaching noted above, the Final Office Action repeats portions of exactly the same analysis detailed above with respect to the rejections under Moder et al. In fact, the rejections over Stravitz expressly cite Moder et al. as supporting the required modifications of the Stravitz kit. All of the discussion given above with respect to the Moder et al. patent is, therefore, equally applicable to these rejections. There is simply nothing cited in the Stravitz reference, either taken alone or in combination with Moder et al. which suggests the desirability of providing a tampon having an absorbent capacity of less than 6 grams. Therefore, the rejections of Claims 1, 6, and 8-20 over Stravitz should be reversed.

**B. The tampon insertion guide of Claim 8 is wholly missing from the Stravitz patent.**

Even assuming the rejection of Claim 1 over Stravitz is proper, the rejection of Claim 8 over Stravitz is nonetheless improper. The Final Office Action seems to equate the term "tampon insertion guide" as that term is used in Claim 8 with an "instruction book" such as that claimed in Claims 19 and 20. The specification, however, on pages 14-15 and in Figs. 6-8, make clear that the tampon insertion guide of the present invention is a device used to help "guide" the physical insertion of a tampon. Because such a term is used distinctly in both the specification and the claims from the term "instruction book" the two terms must have different meanings. Even

assuming the reasoning of the Final Office Action is correct that it would have been obvious to provide instruction books in the claimed feminine hygiene kit – this does not demonstrate that the claimed insertion guide as described in the specification would also have been obvious.

**C. An analysis of Claims 10-13 under Stravitz is completely missing from the Final Office Action.**

Although page 3 of the Final Office Action states that claims 1, 6, and 8-20 are rejected under § 103 over Stravitz, the Office Action never actually applies Stravitz to Claims 10-13. Claims 10-13 are addressed in ground of rejection 3 which is discussed further below. Given that the Final Office Action does not attempt to justify a rejection of Claims 10-13 over Stravitz alone, it must be concluded that even if the rejection of Claim 1 over Stravitz alone is proper, Claims 10-13 must be separately considered.

**D. The positive re-enforcement offerings of Claims 14-18 are not suggested by the Stravitz patent**

In rejecting claims 9 and 14-18 the Final Office Action concludes that adding all of the claimed limitations would be obvious because the purpose of the kit [Stravitz] is to provide convenience to the user. Even accepting this as true, such analysis does not apply to Claims 14-18. Claims 14-18 are directed to items which may be included in the kit to provide a user with a “reward” she can give herself to promote positive re-enforcement while first trying tampons. Because the Final Office Action nowhere attempts to show how Stravitz discloses or suggest such features, the rejections of Claims 14-18 should be reversed.

**III. The final office action does not make out a proper § 103 rejection of Claims 10-13 over Stravitz in view of Morrow because these rejections rely on the same analysis and reasoning used with respect to the rejections over Moder et al.**

The rejections of claims 10-13 stem from the same basic rejection made of Claim 1 under ground II, above. As noted previously, that rejection was based on the same reasoning and analysis used to reject claim 1 over Moder et al. The Final Office Action adds nothing in the analysis applied to Claims 10-13 to overcome the deficiencies discussed above with respect to Claim 1. Therefore, the rejections of Claims 10-13 should be reversed for all of the reasons the rejections of claim 1 should be reversed.

SUMMARY

None of Claims 1-6 and 8-20 has been properly rejected under 35 U.S.C. § 103 in light of the reasoning and analysis given in the Final Office Action. In light of all of the analysis and discussion provided above, Appellants respectfully request the Honorable Board of Patent Appeals and Interferences to reverse the rejections of Claims 1-6 and 8-20 and to remand the application with instructions that these claims be allowed over the cited art.

Respectfully submitted,

By *Matthew P. Fitzpatrick*  
Matthew P. Fitzpatrick  
Attorney for Appellants  
Registration No. 41,751  
Tele. No. (513) 626-4287

Date: August 22, 2003

**Customer No. 27752**

(AppealBrief.doc)  
LAST REVISED 4/3/2003

**APPENDIX – Claims on Appeal**

1. A feminine hygiene kit comprising:  
an absorbent tampon, said tampon comprising an absorbent core and a withdrawal mechanism attached thereto, wherein said absorbent core has a syngyna absorbent capacity of less than 6 grams, and  
a backup feminine protection product, wherein  
said absorbent tampon and said backup feminine protection product are packaged in a common package.
2. The feminine hygiene kit of Claim 1 wherein said backup feminine protection product is a pantiliner.
3. The feminine hygiene kit of Claim 2 wherein said pantiliner has a caliper of less than or equal to about 3 mm.
4. The feminine hygiene kit of Claim 1 wherein said backup feminine protection product is a sanitary napkin.
5. The feminine hygiene kit of Claim 1 wherein said backup feminine protection product is an absorbent interlabial device.
6. The feminine hygiene kit of Claim 1 wherein said kit further comprises a mirror.
8. The feminine hygiene kit of Claim 1 wherein said kit further comprises a tampon insertion guide.
9. The feminine hygiene kit of Claim 1 wherein said kit further comprises a vaginal lubricant.
10. The feminine hygiene kit of Claim 1 wherein said kit further comprises an insertion glove.
11. The feminine hygiene kit of Claim 10 wherein said insertion glove may also be used as a disposal wrapper for said tampon.
12. The feminine hygiene kit of Claim 1 wherein said kit further comprises a finger cover.

13. The feminine hygiene kit of Claim 12 wherein said finger cover may also be used a disposal wrapper for said tampon.
14. The feminine hygiene kit of Claim 1 wherein said kit further comprises a bonus product offering.
15. The feminine hygiene kit of Claim 14 wherein said bonus product offering comprises candy.
16. The feminine hygiene kit of Claim 14 wherein said bonus product offering comprises a bath product.
17. The feminine hygiene kit of Claim 14 wherein said bonus product offers comprises a coupon.
18. The feminine hygiene kit of Claim 17 wherein said coupon may be redeemed in conjunction with women's health services.
19. The kit of Claim 1 wherein said kit further comprises an instruction booklet.
20. The kit of Claim 19 wherein said instruction booklet comprises instructions which assist a consumer in creating a tampon usage system.